# FEDERAL MARITIME COMMISSION

| | |
|---|---|
| SMART GARMENTS,<br><br>*Complainant*,<br><br>v.<br><br>WORLDLINK LOGIX SERVICES, INC.,<br><br>*Respondent.* | Docket No. 10-11 |

Served: September 12, 2013

**BY THE COMMISSION:** Mario CORDERO, *Chairman*, Richard A. LIDINSKY, Jr. and William P. DOYLE, *Commissioners*; Rebecca F. DYE, *Commissioner*, concurring in part and dissenting in part; and Michael A. KHOURI, *Commissioner*, concurring in part and dissenting in part.

## Order Affirming the Initial Decision

## I. INTRODUCTION

On November 30, 2010, Smart Garments (Complainant), a garment manufacturer and exporter, filed a complaint alleging that Worldlink Logix Services, Inc. (Respondent or Worldlink) violated sections 10(d)(1), 10(d)(4), and 10(b)(13) of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. §§ 41102(c), 41106(2), and

41103(a) respectively, regarding Worldlink's handling of two shipments with two bills of lading.

Smart Garments alleged that pursuant to letters of credit, Worldlink was to deliver those goods to the buyer only after receiving the original Worldlink bills of lading, WLS/NYK0909002 and WLS/NYK/0909003. Decision at 2 (Exhibit E). In the Complaint, Smart Garments alleged that Worldlink delivered the goods to the buyer, Munchies of HK, without obtaining those original bills of lading. Complaint at 3-4. To date, Worldlink has not paid Smart Garments the $84,504.00 it allegedly owes Smart Garments. *Id.* at 4.

The Secretary served the Complaint on November 30, 2010. Respondent did not file an answer to the Complaint, and did not respond to the ALJ's Initial Order (served December 1, 2010) or Order Requiring Status Report (served January 19, 2011). On June 13, 2011, the ALJ issued a Notice of Default, and issued an Order to Show Cause for the Respondent to demonstrate why judgment should not be entered against it. The Respondent did not file any response.

On October 31, 2011, the Administrative Law Judge (ALJ) issued a default judgment against Respondent and awarded Complainant, Smart Garments, $84,504.00 plus interest in reparations, in her Initial Decision (Decision). Worldlink failed to respond to the Complaint, the Initial Order, the Order Requiring Report of Status, and the Notice of Default and Order to Show Cause, after being properly served. Decision at 2.

The ALJ held that Worldlink violated section 10(d)(1) by delivering two shipments of ladies jersey knitted pants to Munchies of HK without obtaining the original bills of lading for those shipments, as alleged by Smart Garments. Regarding Smart Garments' allegation that Wordlink violated section 10(d)(4) of the Shipping Act by showing undue preference to the shipper, the ALJ

determined that Worldlink was not a Marine Terminal Operator (MTO). Accordingly, the ALJ held that Respondent could not have violated section 10(d)(4), which only applies to MTOs. Decision at 4. The ALJ held, however, that the evidence supports Smart Garments' claim that Worldlink violated section 10(b)(13) by disclosing the nature, kind, and quantity of its shipment without its consent. *Id.*

No party filed exceptions. The Commission determined *sua sponte* to review the Initial Decision.

For the reasons stated below, the Commission:

(1) affirms the finding of a default judgment against the Respondent;

(2) affirms the finding that the Respondent violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. § 41102(c);

(3) affirms the finding that the Respondent is not a marine terminal operator (MTO) pursuant to 46 C.F.R. § 525.1 (2011) and did not violate section 10(d)(4), of the Shipping Act of 1984, 46 U.S.C. § 41106(2);

(4) affirms the finding that the Respondent violated section 10(b)(13) of the Shipping Act of 1984, 46 U.S.C. § 41103(a); and

(5) affirms the Initial Decision that awards the Complainant $84,504.00 plus interest from February 27, 2010.

## II. DISCUSSION

### A. Default Judgment

Worldlink failed to appear or participate in this case. The party with control of information relevant to a disputed issue may

be assigned the burden to provide such information or suffer an adverse inference for its failure to respond. *Revocation of Ocean Transportation Intermediary License No. 01619N-Central Agency of Florida, Inc.,* 31 S.R.R. 486 (FMC 2008)*; Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Meritt-Submission Materially False or Misleading Statements to the Federal Maritime Commission and False Representation of Common Carrier Vessel Operations,* 29 S.R.R. 1408, 1412 (FMC 2003); *Adair v. Penn-Nordic Lines,* 26 S.R.R. 11, 15 (ALJ 1991), citing *Alabama Power Co. v. FPC,* 511 F.2d 383, 391 (D.C. Cir. 1974). If a party fails to meet this burden by not contesting allegations or evidence that another party provides to a disputed issue, then that party is deemed to have accepted the opposing party's allegations and evidence as true. *Capitol Transportation, Inc. v. United States*, 612 F.2d 1312, 1318-1319 (1st Cir. 1979); *Bermuda Container Line Ltd. v. SHG Int'l Sales Inc*., *FX Coughlin Co., and Clark Building Systems, Inc.*, 28 S.R.R. 312, 314 (ALJ 1998). The presiding officer may issue a default judgment, a cease and desist order, or other just ruling against a party that fails to respond to a properly served order or pleading.[1] *Commonwealth Shipping Ltd.,* 29 S.R.R. at 1412; *Helen Khadem d/b/a Worldwide Cargo Express/Trading*, 28 S.R.R. 994, 995-996 (FMC 1999); *Adair v. Penn-Nordic Lines,* 26 S.R.R. at 15.

Here, Worldlink was properly served the Complaint at its address of record in Iselin, New Jersey on December 1, 2010 (receipt signed by "C. Lubucchiaro"). Despite being properly served, Worldlink did not answer the Complaint, respond to the ALJ's Initial Order, respond to the ALJ's Order Requiring Report of Status, respond to the Notice of Default and Order to Show Cause, or respond to the Default Judgment issued it. Decision at 2.

---

[1] The Commission issued a Final Rule regarding default judgments. 46 C.F.R. § 502.65, that became effective on November 12, 2012. *See* 77 Fed. R. 61519 (Oct. 10, 2012). The Initial Decision, however, occurred before the effectiveness of this Final Rule and thus applied Commission case law addressing default judgments.

By failing to contest allegations against it, the allegations are deemed admitted.

### B. Violations of section 10(d)(1)

Section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), states that:

> (c) PRACTICES IN HANDLING PROPERTY.—A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Section 10(d)(1) requires regulated entities to "establish" just and reasonable regulations and practices, as well as "observe and enforce" the established just and reasonable regulations and practices. If a common carrier, MTO, or ocean transportation intermediary (OTI) failed to establish just and reasonable regulations and practices or the established regulations and practices are unjust or unreasonable, then it has violated section 10(d)(1). If a common carrier, MTO, or OTI establishes just and reasonable regulations and practices, but fails to observe and enforce those regulations and practices, then it has violated section 10(d)(1), regardless of whether a single shipment or multiple shipments are involved. *Yakov Kobel and Victor Berkov v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc., Limco Logistics, Inc., International TLC, Inc.*, __S.R.R. __, 13-25 (FMC July 12, 2013); *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel. Inc.*, ___S.R.R.___, 10-12, (FMC September 4, 2013); *Paul Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010) (non-vessel-operating common carrier (NVOCC) failure to pay the destination agent monies already received by the NVOCC for such services was held a violation of section 10(d)(1) by "failing

to engage in just and reasonable practices"); *William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6 (FMC 2001) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release the cargo at the destination port unless additional money was paid, and instructed its agent to place the shipment on hold); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (ALJ 1993) (NVOCC's failure to carry out its obligation to transport the cargo or to return the money despite repeated demands was held a violation of section 10(d)(1) as it showed "a failure to establish, observe and enforce just and reasonable regulations and practices"); *Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788 (ALJ 1992) (freight forwarder held to have violated section 10(d)(1) by failing to establish, observe and enforce just and reasonable practices with respect to two shipments when the freight forwarder prepared incorrect booking notes and dock receipts, and issued an altered bill of lading containing false information); and *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991) (NVOCC failed to establish, observe, and enforce just and reasonable regulations and practices in violation of section 10(d)(1) when the NVOCC unreasonably aborted a shipment, notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process).

Here, Smart Garments alleged that Worldlink violated section 10(d)(1) by delivering two shipments of knitted ladies jersey pants to the buyer without receiving the original bills of lading for those shipments as it had agreed. Complaint at 2 (Exhibit E); Complaint at 3-4. Worldlink failed to challenge Smart Garments' allegations that it violated section 10(d)(1). As a result, Worldlink is deemed to admit those allegations. *Capitol Transportation*, 612 F.2d at 1318-1319; *Bermuda Container Line*, 28 S.R.R. at 314. As noted above, the Commission has found that a failure to observe and enforce just and reasonable practices is a violation of section 10(d)(1).

### C. Violations of section 10(d)(4)

Section 10(d)(4) of the Shipping Act prohibits MTOs from giving undue or unreasonable preference or advantage to any person. Further, the Shipping Act does not allow MTOs to impose any undue prejudice or disadvantage with respect to any person. 46 U.S.C. § 41106(2). Here, the ALJ did not find that Worldlink engages in the business of furnishing "wharfage, dock, warehouse, or other terminal facilities to people that provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." 46 C.F.R. § 525.1 (2011); *AHL Shipping Co. v. Kinder Morgan Liquids Terminals, L.L.C.*, 30 S.R.R. 520 (ALJ 2004). As a result, the ALJ determined that Worldlink is not an MTO and that section 10(d)(4) is inapplicable to Worldlink. Decision at 4. The record does not appear to contradict that determination.

### D. Violations of section 10(b)(13)

Under section 10(b)(13) of the Shipping Act, common carriers and OTIs "may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee" if disclosure may cause harm to the shipper. 46 U.S.C. § 41103(a).

Smart Garment alleges that it had an agreement with Worldlink only to deliver shipments from Smart Garments after receiving the original bill of lading. Complaint at 5 (Exhibit H). Smart Garments indicated that after it paid Worldlink to deliver those goods to Munchies of HK, Worldlink then delivered those goods without the original bill of lading and thus violated the agreement. *Id*. As a result, Smart Garments never received the

$84,504.00 from Munchies of HK. Decision at 2; Complaint at 3. Evidence supports that the goods were valued at a total of $84,504.00 with one shipment being valued at $78,960.00 and the other shipment being valued at $5,544.00. Complaint at 6 (Exhibits F and G respectively). Worldlink never contested those assertions in this proceeding, and thus the allegations are deemed admitted.

Given Worldlink's lack of reply and the evidence in the record supporting Smart Garments' arguments on this issue, the ALJ held that Worldlink violated section 10(b)(13) when it delivered two shipments from Smart Garments to buyer, Munchies of HK, without receiving the original bills of lading for those shipments. Decision at 4; Complaint at 5 (Exhibit H). As a result, we agree with the ALJ's determination to award a default judgment for the Complainant on the section 10(b)(13) claim.[2]

Upon consideration of the conclusions above:

THEREFORE, IT IS ORDERED, That the ALJ properly issued a default judgment against the Respondent;

IT IS FURTHER ORDERED, That the Respondent violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. § 41102(c);

IT IS FURTHER ORDERED, That the Respondent is not a Marine Terminal Operator pursuant to 46 C.F.R. § 525.1 and did not violate section 10(d)(4), of the Shipping Act of 1984, 46 U.S.C. § 41106(2);

[2] The allegation in the Complaint—a basic recitation of the language of 10(b)(13)--may not have survived a motion to dismiss for failure to state a claim had the Respondent lodged it. Because Respondent failed to appear, the allegation in the Complaint is deemed admitted, and the Respondent has admitted that it violated section 10(b)(13).

IT IS FURTHER ORDERED, That the Respondent violated section 10(b)(13), of the Shipping Act of 1984, 46 U.S.C. § 41103(a);

IT IS FURTHER ORDERED, That the Respondent shall pay to Complainant by September 27, 2013, reparations in the amount of $84,504.00 and interest ($390.36) totaling $84,894.36, and

FINALLY IT IS ORDERED, That this proceeding be discontinued.

By the Commission.

Karen V. Gregory
Secretary

*Commissioner* Dye, concurring in part and dissenting in part:

I concur with the majority's decision to uphold the Administrative Law Judge's (ALJ's) decision to dismiss the claim that Worldlink Logix Services, Inc., violated 46 U.S.C. § 41106(2). I also concur with the majority's decision to uphold the ALJ's decision that Worldlink Logix Services, Inc., violated 46 U.S.C. § 41103(a).

I note that, in my review, the Commission has not found a violation of 46 U.S.C. § 41103(a) in the recent past, and has not provided guidance on what types of conduct result in a violation, and what types of reparations would be available to a successful complainant. I do not believe that this order affirming a default judgment when the Respondent has failed to appear should provide the Commission or its ALJs with precedential guidance on what constitutes a violation of 46 U.S.C. § 41103(a) and what damages are available to a successful complainant.

I dissent from the majority's decision to uphold the ALJ's finding that Worldlink Logix Services, Inc. violated 46 U.S.C. § 41102(c) and his award of reparations in the amount of $84,504.00 for the reasons stated in the dissent by Commissioner Khouri, with whom I joined, in Docket No. 10-06. *Yakov Kobel and Victor Berkov v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc., Limco Logistics, Inc., International TLC, Inc.,* __S.R.R. __, (FMC July 12, 2013);

*Commissioner* Khouri, concurring in part and dissenting in part:

I concur with the majority's decision to uphold the ALJ's decision to dismiss the section (10)(d)(4) claim, 46 U.S.C. § 41106(2), on the basis that Worldlink is not a marine terminal operator.

I do not agree with the majority's decision to uphold the

Administrative Law Judge's (ALJ's) holding that the respondent, Worldlink Logix Services, Inc. (Worldlink), violated section 10(b)(13) of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. § 41103(a).

This provision of section 10, Prohibited Acts, directs common carriers to not disclose, offer, solicit or receive information concerning a cargo movement that may (1) harm a shipper or consignee or (2) harm another common carrier. The harm is clearly in the areas of commercial privilege and confidentiality. The last paragraph of section 10(b)(13) is clear in its several references to the "information" being confidential business information. Section 10(b)(13) has absolutely no relevance or applicability to the alleged facts in this case and I vote to dismiss this claim.

Further, I agree with Commissioner Dye that this order, affirming a default judgment, should not provide the Commission or its ALJs with precedential guidance as to what constitutes a violation of section 10(b)(13) or the appropriate damages.

For the reasons articulated in my dissents in *Yakov Kobel and Victor Berkov v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc., Limco Logistics, Inc., International TLC, Inc.*, __S.R.R.__ (FMC July 12, 2013); and *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, __S.R.R.__ (FMC September 4, 2013), I dissent from the majority's decision *sub judice* to affirm the ALJ's holding that Worldlink violated section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act. I adopt herein and fully incorporate the views and arguments set forth in my dissent in *Kobel* and *Bimsha, Supra*.

At issue in this case is the alleged mishandling of two shipments with two bills of lading. Specifically, the ALJ held that respondent delivered two shipments without obtaining the original bills of lading as required by complainant's letters of credit. No evidence was submitted for the record or even alleged that

delivering cargo contrary to the terms of letters of credit was failure to "establish, observe, and enforce just and reasonable regulations and practices" as required by the clear statutory language of section 10(d)(1). Notwithstanding, the ALJ entered a default judgment against the respondent for violating section 10(d)(1).

The alleged failure of the respondent in this case may be a breach of contract for which the complainant may have a remedy in the appropriate court of law. However, without evidence of more, making a breach of the contract terms of letters of credit in two isolated incidents a statutory violation of section 10(d)(1) subject to the reach of the Shipping Act and the Commission's jurisdiction serves no public purpose that is uniquely advanced by the expertise resident within the Federal Maritime Commission. Simply put, without more, these two isolated failures to comply with letters of credit do not fall within the scope and purpose of the Shipping Act.

As I noted in *Bimsha*:

> Given these defined areas of jurisdiction (of the Shipping Act), and within which Congress charged the Commission to develop, maintain and exercise a full level of agency expert capacity, it seems a *non sequitur*, if not outright contradiction, that Congress intended the Commission to be the court room for a single lost motorcycle in *Adair*, a single lost car in *Symington*, a single container, damaged in a dock-side loading mishap, but then mistakenly placed on a later vessel call as in *Kobel*, or three mishandled bills of lading as represented in the *Bimsha* matter *sub judice*. None of these matters even resemble "an evil" targeted by section 10(d)(1).

*Bimsha*, (Slip Opinion at 35).

I would add to that list the two containers delivered by Worldlink without obtaining the required original bills of lading.